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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-512

BOLT ASSOCIATES, INC.,

Petitioner,

vs.

WESTERN GEOPHYSICAL COMPANY OF AMERICA,

Respondent.

BOLT ASSOCIATES, INC.,

Petitioner,

vs.

LITTON INDUSTRIES, INC.,

Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN D. FASSETT,
Box 1832,
New Haven, Conn. 06508,
Counsel for Respondents

Of Counsel:

WILLIAM J. DOYLE
SHAUN S. SULLIVAN
Box 1832
New Haven, Conn. 06508

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Opinions Below

The opinion of the Court of Appeals dismissing petitioner's appeal is not officially reported yet and appears in petitioner's appendix at page 55a. The opinion of the Court of Appeals denying petitioner's motion for rehearing is not officially reported yet and appears in petitioner's appendix at page 71a. The opinion of the District Court is not officially reported and appears in petitioner's appendix at page 38a.

Statutes and Rules Involved

The pertinent statutes and rules are set forth in the petition at pages 3-4.

Counterstatement of Case*

This is a frivolous petition. It is just another in a long line of attempts by petitioner to delay final resolution of this action by the District Court.

This action was brought in March, 1967, by respondent, Western Geophysical Company of America, Inc. ("Western"), to enforce two agreements which grant Western certain rights to devices used in off-shore, sub-bottom exploration for oil. In response, petitioner, Bolt Associates, Inc. ("Bolt"), asserted, among other things, contract and patent infringement counterclaims against Western alone, and a number of defenses and counterclaims against Western and respondent-third-party defendant, Litton Industries, Inc. ("Litton"), which alleged, generally, that the agreements Western sought to enforce violate Clayton Act § 7 (15 U.S.C. § 18) and are part of Western's monopolization and attempt to monopolize off-shore, sub-bottom exploration in violation of Sherman Act § 2 (15 U.S.C. § 2). Bolt later added a sixth counterclaim that alleged additional violations by Western and Litton of Sherman Act §§ 1 and 2 and Clayton Act § 7.

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* The history of this litigation prior to trial and the issues involved are explained in detail in *Western Geophysical Co. of America, Inc.* v. *Bolt Associates, Inc.*, 440 F.2d 765 (2d Cir. 1971) (App. 25a), and will not be repeated here, except for a brief summary.

Prior to trial, the patent infringement counterclaim and the sixth counterclaim were severed for a later trial, and, by agreement of the parties, the question of damages was reserved for a later trial as was one other antitrust counterclaim.

The trial commenced on March 9, 1971, and concluded on April 2, 1971. On February 16, 1972, the District Court filed a comprehensive memorandum of decision which found for Western on both contract claims, stating with respect to Western's performance under the exclusive license agreement:

> "Without reviewing what has gone before, it is clear, and I so find, that throughout the entire time from the inception of the license agreement to June 30, 1966, when it was effectively terminated by the defendant, Western exercised due and active diligence in wholehearted good faith to use and to promote the licensing and use of the PAR gun by others. I conclude that Western has shown a full compliance with its contractual obligations to use its 'best efforts.' Thus, with respect to that alleged default, Bolt was unjustified in terminating the contract." (App. p. 43a)

And on the antitrust counterclaims and defenses that had been tried, the District Court held:

> "The defendant offered no evidence of a purpose or intent on the part of Western or Litton to exclude competition by suppressing the PAR. The express provisions of the agreement, which Western entered into and which imposed on it the obligation to use its best efforts to sub-license others to use the PAR throughout the world, negates any such motive. Furthermore, as already shown, Western never refused to sub-license anyone, nor was it ever wanting in diligence or good faith in promoting the use of PAR by others.
>
> • • •

"Notwithstanding that Bolt's antitrust defenses and counterclaims are without merit, it is advisable to pass on Bolt's standing to maintain them. At an earlier stage of these proceedings an affidavit stating that Bolt was a competitor of Western's was held sufficient to withstand a plaintiff's motion for summary judgment based on Bolt's lack of standing to assert antitrust defenses and counterclaims. The Court of Appeals has recently reaffirmed the principle that in order to have 'standing' to recover treble damages for violation of the antitrust laws the plaintiff 'must be within the "target area"' of the alleged antitrust conspiracy, i.e. it must be a person against whom the conspiracy was aimed, such as a competitor of the person sued. [Citations omitted]

• • •

"It is almost impossible for anyone with a head on his shoulders to consider the foregoing facts without seeing that Bolt's claim that it is a competitor in the field of contracting for off-shore, deep-sea seismic exploration is a pretense and a sham, and merely asserted for the purpose of exaggerating the importance of its own device and drawing attention away from the objective factors needed to make it workable.

"To sum up at this point, the court finds that Bolt's purported termination of the license agreement of April 1963 was unjustified, that Western was not in default of its obligations thereunder in any respect, that the defenses Bolt asserts are without merit, and that its counterclaims against Western and its cross-claims against Western and Litton are unproven. Western is entitled to recover damages against Bolt for wrongful termination of the first license agreement." (App. pp. 44a-45a)

The District Court then directed that judgment be entered in accordance with Fed.R.Civ.P. 54(b) in favor of Litton

and Western on all issues, and, with respect to the antitrust counterclaims that had been reserved for a later trial, the Court held:

> "Despite these reservations, issues dispositive of all of the antitrust counterclaims were necessarily resolved against Bolt at this trial. Based on the findings made above and the conclusion that Bolt lacks standing to assert its antitrust counterclaims, I further determine that there is no just reason for delay and expressly direct that judgment also be entered dismissing the third, fourth and sixth counterclaims against Western and Litton." (App. p. 49a)

Judgment was entered in accordance with the District Court's direction with the result that all issues were disposed of except for the patent infringement counterclaim and a determination of the amount of damages due Western.

The petitioner then filed a notice of appeal and moved for a stay of further proceedings pending appeal. The District Court denied the motion and, on April 27, 1972, it referred the question of damages to a United States Magistrate to act as a special master to hear and report. Following the appointment of the special master, Western commenced pre-trial discovery and recently it requested the special master to set the matter down for a January, 1973, trial date.

True to character, and despite the fact that Bolt knows that the District Court's action will be finally resolved shortly, Bolt now seeks another procedural device that will permit it to delay again Western's prosecution of its lawsuit. Two courts, intimately familiar with this lengthy and complex litigation, already have refused to permit Bolt to do so, and now Bolt is before this Court seeking similar relief.

REASONS FOR DENYING THE PETITION

A. *The Decision Below Is Not Final.*

Petitioner here seeks review of an interlocutory order and review of such orders is frowned upon. In *American Construction Co.* v. *Jacksonville, T.&K.R. Co.*, 148 U.S. 372 (1893), when presented with a similar issue, this Court stated:

> ". . . this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." (148 U.S. at 384)

See also *Hamilton-Brown Shoe Co.* v. *United States*, 240 U.S. 251, 258 (1916) (lack of finality "of itself alone furnished sufficient grounds for denial"); *Cobbledick* v. *United States*, 309 U.S. 323, 324-5 (1940); *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 584-5 (1952); *cf.* U.S. Sup. Ct. R. 20.

The petition here fails to set forth any extraordinary inconvenience or hardship that Bolt might suffer should this Court deny its petition for certiorari, and, for that reason alone, the petition should be denied. The only possible hardship that an immediate appeal and reversal might alleviate is the expense of a hearing in damages and, as the Court of Appeals noted, that is not sufficient (App. 60a).

B. *The Court Of Appeals Did Not Suggest That Review Of This Case Was Desirable.*

The language quoted by the petitioner from the Court of Appeals' decision (petition p. 7) was taken from a footnote in the Court's opinion (App. p. 61a), and it played no

part in the reasoning of the Court of Appeals that led to the dismissal of petitioner's appeal. The Court of Appeals did not dismiss because it disagreed with the *General Electric* rule; rather, it dismissed because, on a close analysis of the facts of the case before it, the Court concluded that the District Court's dismissal of petitioner's counterclaims did not constitute a "refusal of injunctive relief within the meaning of 28 U.S.C. § 1292(a)(1)."

C. *There Was No Error Below.*

Wholly apart from the fact that the occurrence of error below normally is not a sufficient basis for granting certiorari, it is clear that the Court of Appeals' opinion is free of error.

1. 28 U.S.C. § 1292(a)(1).

Judge Friendly, having participated in an earlier decision of the Court of Appeals involving this case (App. p. 25a), was familiar with the pleadings in this action and each of his opinions demonstrates a careful consideration of all relevant legal and factual issues. Thus, when the Court referred to Bolt's "counterclaims" and concluded that the requests for injunctive relief therein added nothing of substance (App. p. 61a), there is no doubt that the Court of Appeals' analysis included consideration of petitioner's sixth counterclaim.

Additionally, in support of its claim of error here, petitioner points to the fact that the two decisions rendered by the Court of Appeals in this action construed petitioner's antitrust counterclaims differently. The short answer to this argument is that the second opinion of the Court of Appeals dealt with totally different legal

issues and was rendered after the case had been tried. Indeed, Judge Friendly's opinion makes express reference to "what transpired at trial" (App. p. 61a) just prior to his conclusion that petitioner's claims for injunctive relief added nothing of substance to its antitrust counterclaims.

2. Rule 54(b).

It is clear that a Rule 54(b) certification cannot make final and appealable a ruling that is not final and appealable within the meaning of 28 U.S.C. § 1291. *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427 (1956). Rule 54(b) only allows the District Court to choose the time when an otherwise final decision may be appealed in a multiple-party or multiple-claim action. *Sears, Roebuck & Co.* v. *Mackey, supra.* It is also well settled that a judgment determining liability but not fixing damages is not final under 28 U.S.C. § 1291. *Catlin* v. *United States,* 324 U.S. 229 (1945). Accordingly, there is no doubt that the Court of Appeals was correct in holding that the District Court could not certify Western's contract counts under Rule 54(b) (App. p. 58a).

With respect to the remaining antitrust counterclaims, the Court of Appeals quite properly noted that it doubted that the District Court "would have certified the counterclaims alone if it had realized that its disposition of Western's contract claims could not be made appealable by action under Rule 54(b)." (App. p. 59a). In any event, under the authority of *Sears, Roebuck & Co.* v. *Mackey, supra,* the Court of Appeals properly held the District Court's certification of petitioner's antitrust counterclaims to be an abuse of discretion since they were inextricably

intertwined with Western's contract claims. (App. p. 59a). In fact, petitioner at one time apparently agreed with the foregoing analysis since the Court of Appeals' opinion expressly notes that Bolt did not seriously pursue the Rule 54(b) argument before it (App. p. 60a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this unwarranted petition should be denied.

Respectfully submitted,

JOHN D. FASSETT,
Counsel for Respondents.

Of Counsel:

WILLIAM J. DOYLE
SHAUN S. SULLIVAN

October 27, 1972